Filed 1/29/10 U.S. Specialty Ins. Co. v. Superior Court CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

U.S. SPECIALTY INSURANCE COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF SAN BERNARDINO COUNTY,

Respondent;

CHINO VALLEY AVIATION, INC., et al.,

Real Parties in Interest.

E048640

(Super.Ct.No. CIVRS802723)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Martin A. Hildreth, Judge. (Retired judge of the former San Bernardino Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Petition granted.

LaMontagne & Terhar, Ralph S. LaMontagne, Jr., and Eric A. Amador for Petitioner.

No appearance for Respondent.

David S. Brown for Real Party in Interest Michael Horne.

No appearance by Real Parties in Interest Chino Valley Aviation, Inc., or Agustin Cendejas.

## INTRODUCTION

Petitioner U.S. Specialty Insurance Company, plaintiff below, brought a declaratory relief action against real parties in interest—its insured, Chino Valley Aviation, Inc. (Chino Valley Aviation)[1] and Michael Horne (Horne), the injured plaintiff in a third party tort action against Chino Valley Aviation. Petitioner sought a declaration that its policy provided Chino Valley Aviation with coverage *only* under the "completed operations" coverage (Coverage B), and *not* under the "premises liability" coverage (Coverage A). The issue is significant because the latter offers substantially more dollar coverage.

Petitioner moved for summary judgment on the issue. Real party in interest Horne took the laboring oar in opposing the motion, which was denied. The trial court found the policy language somewhat ambiguous and that petitioner had not conclusively

[1] Agustin Cendejas was also sued as Chino Valley Aviation's principal. However, the insurance policy in question lists Chino Valley Aviation as the sole insured.

established that the "reasonable expectations" of the insured would not be for coverage under "Coverage A."[2]

Petitioner seeks review as authorized by Code of Civil Procedure, section 437c, subdivision (m)(1).[3]

## STATEMENT OF FACTS

The following facts are undisputed, based on petitioner's "statement of undisputed material facts" and Horne's response. Chino Valley Aviation performed maintenance and repair work on a certain airplane at its airport facility. Subsequently (how much later is not clear) the airplane departed on a flight and crashed about a half mile west of the airport. Horne, a passenger, suffered personal injuries and claims that the crash was due to improperly performed maintenance or repairs by Chino Valley Aviation.

Petitioner issued a policy to Chino Valley Aviation covering the relevant period. This policy contained two coverages involved in this petition. "Coverage A," the "Airport Bodily Injury and Property Damage Liability," and "Coverage B," the "Products Completed Operations Hazard Bodily Injury and Property Damage Liability." The former offers $1,000,000 in coverage for each "occurrence," with a cap of $2,000,000,

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[2] The matter was determined as one of law, and there was no evidence that Chino Valley Aviation *had*, in fact, relied on the interpretation of the policy, which is put forth here.

[3] Real parties in interest argue that extraordinary relief is not necessary in this case and may, in fact, be inappropriate. We disagree. The Legislature has expressly provided for immediate review of orders granting or denying summary judgment, and speedy review is clearly appropriate where a party is otherwise headed for what may be an unnecessary trial. (See *Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 643.)

while the latter affords only $100,000 *per person*, with a $1,000,000 per occurrence and $2,000,000 cap.

"Coverage A" applies to damage caused by "an occurrence [which] arise[s] out of your ownership, maintenance or use of the covered premises. The occurrence must take place in the coverage territory. . . ." "Coverage territory" is defined as, inter alia, "[t]he United States of America (including its territories and possessions), Puerto Rico and Canada . . ." while "[p]remises" is defined as "[t]he airport premises shown in the Declarations . . . ." "Occurrence" "means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

"Coverage B" applies to damage that is "caused by an occurrence and arise[s] out of your products-completed operations hazard and one or more of the Classifications described in Item 7 of the Declarations." The classifications listed were "Aircraft Repair and Service Including Parts Installed," "Sale of Aviation Fuel and Oil Products," and "Sale of Aircraft Parts and Accessories Not Overhauled, Repaired or Installed." [4] Further, the policy expressly specifies that the "Products-completed operations hazard" "[i]ncludes all bodily injury and property damage occurring *away from covered premises and arising out of your product or your work* . . . ." (Italics added.)

[4] Additional provisions of the policy will be quoted as necessary.

Both petitioner and real parties in interest agree that "Coverage B" applies to the accident in question. But real parties in interest contend, and petitioner denies,[5] that "Coverage A" *also* applies because the airplane crash arose out of Chino Valley Aviation's "use" of the premises to repair or service the airplane.

DISCUSSION

Our review of the matter is conducted de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855, 860; *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 733.) As noted above, there are no declarations and no other evidence to be construed and evaluated.

It is well established that the terms of an insurance policy, like those of any contract, are to be interpreted so as to give effect to the parties' mutual intentions. (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1018.) However, if the terms of a policy may properly be construed as ambiguous, they will be interpreted to protect the "reasonable expectations" of the insured. (*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 495, 501.)

On an initial review of the policy, it seems reasonable to conclude that "Coverage A" and "Coverage B" were presumably drafted by petitioner and paid for by Chino Valley Aviation with the intent to cover different risks and different potential liabilities. However, real parties in interest argue that because "Coverage A" applies to liabilities arising out of the "use" of the "premises," and because the "coverage territory"

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[5] In fact, Chino Valley Aviation did not file a brief in this court. However, we will consider them a "party."

for "Coverage A" includes the entire United States and more, the policy at least permits the construction that "Coverage A" extends to accidents in any way relating to the "use" of the premises. As Chino Valley Aviation "used" the premises to service the airplane, they conclude that "Coverage A" applies.

Real parties in interest rely on *State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94 (*Partridge*) and similar cases such as *Feurzeig v. Insurance Co. of the West* (1997) 59 Cal.App.4th 1276 (*Feurzeig*), which take an expansive view of the term "arising out of." In the former, the insured was driving his vehicle while shooting rabbits out the car window with a modified .357 Magnum. When the car went over a bump, the gun discharged accidentally, seriously injuring a passenger. The insured had both a homeowner's policy and automobile insurance; the insurer conceded coverage under the latter, but asserted that there was no coverage under the homeowner's policy because that policy contained an exclusion for injuries "arising out of the . . . use of . . . any motor vehicle." (*Partridge,* at pp. 98-99.)

Relevant to this case, the court noted that it was well established that in *coverage* clauses, "arising out of" or "use of" are to be given a broad construction. (*Partridge, supra,* 10 Cal.3d at p. 100, citing *St. Paul Fire & Marine Ins. Co. v. Hartford Acc. & Indem. Co.* (1966) 244 Cal.App.2d 826, 831.) More recently, this rule was cited in *Feurzeig,* which involved an action for slander in which the defamatory statements had concededly been made on the insured's business premises. *Feurzeig* confirms the broad and comprehensive application of the term "arising out of the use of" in premises liability coverage. But notably, there was no discussion in that case as to whether any other

provision of the policy could possibly apply, and we think it obvious that if there had been "completed operations/products" coverage, that would *not* have applied.[6] (*Feurzeig, supra*, 59 Cal.App.4th at p. 1285.)

We have no quarrel with the general principles derived from these cases on which real parties in interest rely. We also concede that under those principles, the accident in question *did* "arise out of" the use of the premises when Chino Valley Aviation serviced or repaired the subject airplane. But in our view, the crux of the issue is not whether the accident arose out of the use of the premises, but whether a reasonable insured could have believed that "Coverage A," *as well as* "Coverage B," applied to any such accident. The question in this case is whether "Coverage A" can reasonably be construed as applying only to injuries that are *temporally connected with the use, occupation, or maintenance of the premises*. Reading the policy as a whole, we believe the answer must be "yes."

In arguing for this result, petitioner relies on *Fibreboard Corp. v. Hartford Accident & Indemnity Co.* (1993) 16 Cal.App.4th 492, in which Justice Anderson of the First District, Division Four, explained the distinctions between "'products hazard'" coverage, and "general operations" coverage, as the two facets of the policy were labeled in that case. Fibreboard, the insured, manufactured and sold products that contained asbestos and, by the time of the suit, was the subject of myriad claims based on the presence of asbestos in products installed in the claimants' buildings. The insurer had

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[6] The primary issue in *Feurtzeig* was whether coverage was *excluded* because the endorsements of the policy indicated that it covered "Lessor's Risk," and the slander took place on premises not leased out by the insured, but which were used for its own business. (*Feurzeig, supra*, 59 Cal.App.4th at pp. 1285-1287.)

paid out policy benefits under the "'products hazard'" coverage, but Fibreboard argued that because many of the claimants' ingenious legal theories (such as "concert of action, failure to disclose . . . civil conspiracy, failure to develop asbestos-free products . . .") did not relate directly to the actual asbestos-containing products, there was also coverage under the "general operations" or "premises-operations" coverage. (*Fibreboard*, at pp. 496-497, 501.)

For our purposes, the crucial part of the court's analysis is that a general commercial liability policy is normally structured to provide a "continuum of coverage" and that "premises-operations" coverage and "products liability" coverage "are complementary and not overlapping." (*Fibreboard*, *supra*, 16 Cal.App.4th at pp. 500-502, quoting 7A Appelman, Insurance Law & Practice (1979) § 4508, pp. 340-341.) It noted that a "person who performs a service can incur liability in a number of ways, including '(1) while work is in progress, [and] (2) after completion.'" (*Fibreboard*, at p. 500.) Although the claimants charged Fibreboard with negligence and other errors during the manufacturing process, the court held that all of these claims actually related to the completed products. As the claimants' injuries did not occur *during* manufacture, it was the "completed products" coverage that applied, and *only* that coverage. "'[I]t is well to recognize that products liability is a coverage that takes over where premises-operations leaves off .'" (*Id*. at p. 501.) Finally, it notes that if decisions involved in the manufacturing process, which result in defects (such as design decision), are considered separate from the defective product itself, "then the policy distinction between the two

coverages is lost." (*Id.* at p. 510; accord, *Travelers Casualty & Surety Co. v. Employers Ins. of Wausau* (2005) 130 Cal.App.4th 99, 113-114 (*Travelers*).)[7]

The trial court here found that the policy under consideration in *Fibreboard* "differs dramatically" from that in this case, and that the case is "easily distinguished on the facts . . . ." Real parties in interest argue that, in our case, the two coverages are not mutually exclusive as they were in *Fibreboard.* We agree that the details differ but not the fundamental analysis.

Here, the policy in "Coverage A" provides coverage for injury that "arise[s] out of [the] ownership, maintenance or use" of the airport premises. We do not read or construe this language in a vacuum, but rather in the context of the policy as a whole, "'and give effect "to every part" of the policy with "each clause helping to interpret the other."'" (*Lyons v. Fire Ins. Exchange* (2008) 161 Cal.App.4th 880, 887.) As we have noted, the trial court reasonably concluded that, under established law, the "arising out of the use" language *could* apply to injuries suffered as a result of negligent repairs made on the airport premises. However, when "Coverage A" is read in conjunction with "Coverage B," it is apparent that a "continuum" of coverage has been created. The only construction that does not make "Coverage B" largely redundant, is that "Coverage A" applies to injuries that occur *during* the use of the premises. To hold otherwise would

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[7] In *Travelers*, the insureds were sued over defective latex, which they distributed and apparently manufactured. The appellate court's comments that the *premises liability* coverage did not apply were dictum; as it noted, the insurer did not even attempt to argue that the claims related to *premises operations*. (*Travelers*, *supra*, 130 Cal.App.4th at p. 114 & fn. 7.)

simply conflate the coverages. If an airplane owner is watching repairs and slips on a greasy patch, the injury "arises out of the use" of the premises and "Coverage A" applies. However, if the repairs have been completed and the plane subsequently crashes, the "completed operations" "Coverage B" applies. The language of "Coverage B" at least makes this very clear by stating that it covers damage "occurring *away from* covered premises." (Italics added.)

If we adopt real parties in interest's view, the entire transaction becomes nonsensical. If Chino Valley Aviation had believed, after reading "Coverage A," that it would cover injuries that occurred after a plane had been serviced and returned to its owner, *why would it have also obtained* "*Coverage B*?" The operations expressly covered by the latter—aircraft repairs, sale of fuel, and sale of parts—all indisputably involve the "use" of the premises *when the activities are performed*. Under real parties in interest's construction, any *subsequent* injuries relating to the repairs or sales would *also* be covered under "Coverage A," making "Coverage B" utterly redundant. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641; see *Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 887.) In this case, that means that just as "Coverage B" expressly applies only to "completed operations," "Coverage A" can only apply to "occurrences," which "arise" *directly and immediately* from the use

or operations of the premises.[8] Granted, "Coverage A" is not *explicit* in this respect, but the conclusion is unavoidable when the two coverages are read together. After reading "Coverage B," no reasonable insured could read "Coverage A" and believe that it would cover the same occurrences. While an insured might well desire such coverage *after* an injury-causing occurrence, no insured would willingly pay twice for the same coverage.[9]

As petitioner points out, the premium paid for "Coverage A" was $1,350. The premium for "Coverage B" was $4,300.[10] Yet, real parties in interest claim that the *smaller* premium afforded for "Coverage A" in fact afforded them *all* the coverage

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[8] In *Kramer v. State Farm Fire & Casualty Co.* (1999) 76 Cal.App.4th 332, 339 [Fourth Dist., Div. Two], this court commented that with respect to premises liability, injury due to "a structural defect or other dangerous condition . . . is probably the type of injury most property owners have in mind when they purchase liability coverage."

[9] Of course, real parties in interest now desire the additional dollar coverage; but, if this had been the original concern, the only logical way to achieve it would have been to increase the policy limits for one coverage or the other.

[10] The risk under "Coverage B" is clearly distinct from, and greater than, that under "Coverage A." That is because neglect or otherwise damaging conduct, which falls under "completed operations," is likely to involve a malfunction of an aircraft and very possibly a crash, representing a substantial risk of serious bodily injury or death. While such injuries can, of course, occur as a result of premises liability, the likelihood of catastrophic injury is less.

specifically set out in "Coverage B" as well.[11] While the amount of premium is, of course, not dispositive, it does represent the insurer's evaluation of risk, and courts are very reluctant to find that a small premium insures a large risk. (See *Fidelity & Deposit Co. v. Charter Oak Fire Ins. Co.* (l998) 66 Cal.App.4th 1080, 1086.) The point simply underscores the conclusion that "Coverage A's" application is not unlimited, but that it covers typical "premises liability" risks.

Finally, we reject real parties in interest's contention that the description of the "coverage territory" in "Coverage A"—that is, "[t]he United States of America, . . . Puerto Rico and Canada" justifies an assumption on the part of the insured that the provisions would extend coverage for *any* damage suffered in the described territory. It simply warns the policyholder that there will be no coverage for damage arising out of occurrences that do not take place in the "coverage territory," not that all occurrences, which do so take place, *are* covered. It is perfectly possible to postulate an "occurrence" giving rise to premises liability that do not take place directly *on* the premises—for example, off-premises damage resulting from a fire, explosion, or toxic lead. It does not

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[11] Although we have not previously had occasion to consider a third coverage provided by the policy, real parties in interest's arguments would similarly apply to "Coverage C," the "Hangarkeepers Liability." This coverage applies to damage incurred by aircraft in the insured's possession as bailee for the purposes of storage or repair, and expressly applies to damage, which "arise[s] out of your ownership, maintenance or use of the airport." Real parties in interest would presumably contend that "Coverage A" also applies to such damage—a contention that we would find similarly unpersuasive. It is clear to us that the "Hangarkeepers Liability" is intended to, and does, offer the *exclusive* coverage for damage to aircraft left in the insured's care on the premises.

provide a hook on which real parties in interest can drastically expand the application of "Coverage A."

We conclude that there is no triable issue of fact concerning what the policy means *or* what Chino Valley Aviation, as the primary insured, could have reasonably expected it to mean. Accordingly, petitioner was entitled to summary judgment in its favor on its claim for declaratory relief.

DISPOSITION

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing the Superior Court of San Bernardino County to vacate its order denying petitioner's motion and to enter a new order granting the motion.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

Petitioner to recover its costs.

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GAUT
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.